

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	SMALL CLAIMS
<b>JOHANNI PENA</b>	:	DETERMINATION
	:	DTA NO. 820450
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 2002.	:	

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Petitioner, Johanni Pena, 1871 Andrews Avenue, Apt. 1, Bronx, New York 10453, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on March 9, 2006 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

Since neither party reserved time to submit a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit of \$1,136.00 on the basis that he failed to substantiate that he had actually earned the \$13,520.00 of self-employed business income as reported on his 2002 New York State resident income tax return.

***FINDINGS OF FACT***

1. On or before April 15, 2003, petitioner herein, Johanni Pena, timely filed with the Division of Taxation (“Division”) his New York State and City resident personal income tax return for the 2002 tax year. On the return, petitioner claimed head of household filing status and two dependent exemptions for his daughters, who were born in 1991 and in 1993, respectively.

2. Petitioner’s 2002 tax return reported New York adjusted gross income of \$12,565.00, which amount consisted of business income of \$13,520.00 and a \$955.00 adjustment to income for one-half of his Federal self-employment tax. After subtracting \$10,500.00 for the standard deduction and \$2,000.00 for two dependent exemptions, there remained \$65.00 of taxable income. The \$65.00 of taxable income produced \$5.00 of State and City tax due, which amount was reduced to zero after allowance of the household credit. Petitioner’s return claimed a refund of \$1,199.00, which amount included \$1,136.00 for the New York State earned income credit and \$63.00 for the City of New York school tax credit.

3. Information available to the Division from the Internal Revenue Service revealed that petitioner’s Federal Schedule C-EZ, Profit or Loss from Business, reported gross receipts of \$13,520.00; that gross receipts were not reduced by any claim for cost of goods sold and that petitioner incurred no expenses or deductions in this business.

4. The Division, in order to verify that petitioner was entitled to the \$1,136.00 earned income credit as claimed on his 2002 tax return, requested that petitioner substantiate both his reported business income and that he had two qualifying dependents. On February 6, 2003, petitioner responded to the Division’s request for information by submitting documentary evidence regarding his two daughters and a copy of a notarized letter from his employer which

stated that “I, Altagracia Rodriguez, owner of CLASSIC TOUCH BARBER SHOP, certify that Mr. Johanni D. Pena earns \$260.00 weekly as a barber in my establishment. It is a pleasure to work with Mr. Pena.”

5. After reviewing the evidence submitted, the Division concluded that petitioner had adequately substantiated that he had two qualifying children for earned income credit purposes. The Division, however, found that the notarized statement from Ms. Rodriguez was inadequate to prove either (a) petitioner’s receipt of business income during the 2002 tax year, or (b) if business income was received, the exact dollar amount of the business income. Accordingly, the Division issued a Statement of Refund Adjustment to petitioner advising him that the New York State earned income credit of \$1,136.00 as claimed on his 2002 income tax return was denied.<sup>1</sup>

6. On May 19, 2003, petitioner, in response to the Division’s Statement of Refund Adjustment, provided the following description of his business activities during the 2002 tax year:

I sent all information in regards to the establishment where I conduct my business. Since I am a professional hairstylist, I do not get paid by check nor do I have a receipt ledger. All payments made to me are made in cash by my loyal customers (copy of license enclosed). I gave you a notarized letter from the business location explaining how much I earned and whom could you call [sic] to verify that information.

Attached to petitioner’s letter of May 19, 2003, was a copy of his State of New York, Department of State license indicating that he was “duly licensed to engage in the practice of barbering.”

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<sup>1</sup> The Division refunded to petitioner the \$63.00 New York City school tax credit, and therefore this amount is not in dispute in this proceeding.

7. On July 7, 2003, the Division issued a Notice of Disallowance to petitioner with respect to the \$1,136.00 New York State earned income credit claimed on his 2002 income tax return.

The Notice of Disallowance provided the following explanation:

In your letter dated May 19, 2003 you state that you are paid in cash. As an employee, your wages should be reported to the New York State Tax Department throughout the tax year, and are subject to payroll withholding tax.

At the end of the year, your employer is legally bound to supply you with a W-2 statement which indicates the documented amount of income earned throughout the tax year and tax withheld for the wages earned.

Since you did not provide documented proof of your earnings for the above tax year by supplying a W-2 statement, your claim for the earned income credit has been denied.

8. To further prove his receipt of earned income during the 2002 tax year, petitioner submitted a second notarized letter from Classic Touch Beauty Salon, signed by Altagracia Rodriguez and dated March 23, 2004, which stated that “[T]he reason of [sic] this letter is to inform you that Mr. Johanni D. Pena, has been working for this barber shop since, 1998 to present, he is handling the position of barber earning weekly cash salary of \$225.00.”

#### ***SUMMARY OF THE PARTIES' POSITIONS***

9. The Division maintains that a self-employed individual is required to keep books, records, receipts and documents in a format and in a quantity sufficient to clearly show how much was earned and what the expenses were. The Division asserts that the two notarized statements from Ms. Rodriguez should be accorded little or no weight since they cannot be verified and also claim different amounts, \$260.00 and \$225.00, as the weekly cash payments made to petitioner. The Division argues that petitioner, who admittedly did not maintain any books and records with respect to his activities as a hairstylist, has failed to present any credible

evidence to support the amount of his claimed business income for the 2002 tax year and has thus not met his burden of proof pursuant to Tax Law § 689(e).

10. Petitioner asserts that his credible testimony, coupled with the documentary evidence submitted, is sufficient to prove that he had \$13,520.00 of net business income during the 2002 tax year from his activities as a self-employed hairstylist.

### ***CONCLUSIONS OF LAW***

A. As applicable to this proceeding, Tax Law § 606(d) provides that the New York State earned income credit for the 2002 tax year is equal to twenty-seven and one-half percent “of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . .” Since the State earned income credit is determined based solely on a percentage of the Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code (“IRC”) and Federal case law to determine petitioner’s eligibility for the earned income credit.

B. The Federal earned income credit, provided for pursuant to IRC § 32, is a refundable tax credit for eligible low-income workers. The credit is computed based on a determination of a taxpayer’s “earned income” which includes, *inter alia*, wage income and earnings from self-employment (IRC § 32[c][2]). Since the Division has conceded that petitioner had two qualifying children for earned income credit purposes, the only issue to be addressed herein is whether petitioner has sustained his burden of proof (Tax Law § 689[e]) to show that he generated \$13,520.00 of earned income during the 2002 tax year from his activities as a hairstylist.

C. In the instant matter, petitioner has failed to meet his burden of proof to show that he had \$13,520.00 of earned income from his activities as a hairstylist. Although there appears to be no dispute that petitioner was performing services as a hairstylist, petitioner has failed to

produce any books, records, receipts and documents to clearly show how much he earned from his activities as a self-employed individual during the 2002 tax year. The two notarized statements from Ms. Rodriguez have been given little weight since the reliability of the notarized statements is immediately brought into question as they contradict each other with respect to the amount purportedly paid to petitioner. Also, and perhaps most importantly, the statements made in the notarized statements, which are crucial to petitioner's case, are not subject to cross-examination, and therefore Ms. Rodriguez's credibility cannot be assessed. Finally, although the need to maintain a record of his earnings was brought to petitioner's attention in early 2003, petitioner, to this date some three years later, still does not maintain such records. Petitioner's testimony, although forthright and sincere, is, without credible corroborating documentary or testimonial evidence, simply not sufficient to sustain his burden of proof. Since the earned income credit is computed based on the amount of a taxpayer's earned income and since petitioner has failed to establish with any degree of accuracy what his earned income was for the 2002 tax year, he is not entitled to any earned income credit for 2002.

D. The petition of Johanni Pena is denied and the Division's Notice of Disallowance dated July 7, 2003 is hereby sustained.

DATED: Troy, New York  
June 8, 2006

/s/ James Hoefer  
PRESIDING OFFICER